

SERVED: June 23, 1993

NTSB Order No. EA-3910

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of June, 1993

JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10916
v.)	
)	
RODGER M. ELLIS,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on July 30, 1991, following an evidentiary hearing.¹ By that decision, the law judge affirmed in part an order of the Administrator suspending respondent's airline transport pilot (ATP) certificate on allegations of several violations of the Federal Aviation

¹The initial decision, an excerpt from the hearing transcript, is attached.

Regulations (FAR), 14 C.F.R. Part 91, and modified the Administrator's order from a 90-day to a 30-day suspension of respondent's ATP certificate.

The Administrator's order, which served as the complaint in this matter, alleged in pertinent part as follows:

2. On November 13, 1988 you acted as pilot-in-command of civil aircraft no. N935SJ, a Beech Model 200, on a flight from Gordonsville (GVE) VOR to LaGuardia Airport, New York.
3. At said time and place you did not have appropriate pertinent navigation charts on board and you filed for an arrival procedure for which you were not authorized.
4. You were cleared to the GVE VOR to hold SW, left turns and acknowledged said clearance but held in a right turn.

By reason of the foregoing, you violated the following sections of the Federal Aviation Regulations:

1. Section 91.5, in that prior to beginning the flight, you as pilot-in-command failed to familiarize yourself with all available information concerning that flight.
2. Section 91.183(a)(4), by failing to have the pertinent navigation charts on board the aircraft.
3. Section 91.75(b), in that in an area in which Air Traffic Control (ATC) is exercised, you operated an aircraft contrary to an ATC instruction.
4. Section 91.9, in that you operated an aircraft in a careless or reckless manner so as to endanger the life or property of another.

At the conclusion of a two-day, bifurcated hearing,² the law judge determined that the Administrator had established only the allegations of violations of FAR Sections 91.183(a)(4) and 91.75(b).³ Respondent, who is not represented by counsel, has filed an appeal brief in which he asserts that the Administrator failed to establish these violations by a preponderance of the evidence, and in which he argues that the law judge erred in refusing to credit his defense. The Administrator, who has not appealed the law judge's modifications to his order, has filed a reply brief, urging the Board to affirm the initial decision.

²The case was heard in Washington, D.C., where the Administrator presented his witnesses in the absence of respondent, and in Arlington, Texas, where respondent testified on his own behalf. Respondent claims that the law judge's comments on the record expressing his disapproval of such bifurcated proceedings (which in this case had been approved by a previously assigned law judge), had a "negative bearing" on the initial decision. We reject this claim. We have found no evidence in this record of any bias on the part of the law judge against either party to this proceeding.

³FAR §§ 91.183(a)(4) and 91.75(b) provided at the time of the incident as follows:

"§ 91.183 Flying equipment and operating information.

(a) The pilot in command of an airplane shall insure that the following flying equipment and aeronautical charts and data, in current and appropriate form, are accessible for each flight at the pilot station of the airplane....

(4) For IFR, VFR over-the-top, or night operations, each pertinent navigational en route, terminal area, and approach and letdown chart.

§ 91.75 Compliance with ATC clearances and instructions....

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction."

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified by the law judge. For the reasons that follow, we will deny respondent's appeal.

On the day in question, respondent was operating his aircraft at an altitude of 33,000 feet. When he was about 290 miles away from his destination of New York's LaGuardia Airport, he contacted air traffic control (ATC). A controller gave respondent a clearance which would have required him to follow a routing via the Gordonsville VOR outbound, then track several radials until he reached the Nanci intersection, and then proceed direct to LaGuardia. Respondent read back the clearance, but advised ATC that he could only accept it if ATC gave him a fix between the airways and the intersection. The controller told respondent that he would have to get back to him.

ATC subsequently instructed respondent to descend and maintain an altitude of 29,000 feet. Respondent then questioned the controller as to why ATC was instructing him to descend when he was still 290 miles from his destination. The controller told respondent that if he had a complaint he should put it in writing, and not tie up the frequency. Respondent complied with the instruction to descend.

During the bantering back and forth between respondent, the controller, and the controller's supervisor, respondent stated

more than once he did not have low altitude charts available to him for the area around the Gordonsville VOR, in an apparent attempt to explain to ATC why he did not want to descend and why he had to continuously ask the controller for fixes. The ATC supervisor advised respondent that he should have anticipated this routing, which was standard for the area. Respondent was then instructed to enter a holding pattern with left turns at Gordonsville. Respondent entered the holding pattern, but made right turns instead. Although ATC saw his error on their radar screen, they did not correct him because they felt it safer under the circumstances not to do so. Eventually, ATC was able to provide radar vectors to respondent and he landed without incident. During the course of these communications, respondent was twice asked to contact ATC when he landed, and both times he replied to the effect that the FAA could get his phone number from his flight plan, and they could call him.

Respondent admits that his manner towards the controllers was belligerent, but he contends that this was because he was suffering from hypoxia.⁴ He asserts that the existence of this condition is also why he "lied" when he said he did not have low

⁴An excerpt of the Airman's Information Manual is attached to respondent's appeal brief. The AIM indicates that hypoxia is a state of oxygen deficiency in the body sufficient to impair functions of the brain and other organs. It may affect judgment, memory, alertness, coordination and ability to make calculations, and cause headache, drowsiness, dizziness and either a sense of well-being (euphoria) or belligerence. Significant effects of hypoxia usually do not occur below altitudes of 12,000 feet, but this may be affected by other factors, such as if the pilot, like respondent, is a smoker. Respondent testified that the cabin pressure of his aircraft was 11,500 feet.

altitude charts (which he now claims he had on board).⁵

Furthermore, respondent suggests that hypoxia caused him to misunderstand ATC's instructions regarding the holding pattern. Respondent argues on appeal that the law judge should not have sustained the violations in light of this defense. We disagree.

The law judge rejected respondent's claim that he was suffering from hypoxia largely as a matter of credibility. The law judge noted that, having listened to the tape recording of respondent's communications with ATC,⁶ respondent's speech seemed neither slurred nor particularly belligerent when he was arguing with the controllers over the routing. Secondly, the law judge noted, respondent's claim of hypoxia is not borne out by the tape recording, which does not show a change in his attitude or in his

⁵Respondent also claims that where the transcript of his communications with ATC indicates that he said "we sure don't" have low altitude charts, he actually said "we sure do." Although this portion of the recording is unclear, it is not critical to our finding of a violation of FAR § 91.183(a)(4) because respondent repeatedly admits elsewhere on the recording that he did not have the low altitude charts for the Gordonsville VOR available, and his admissions to that effect are consistent with his many requests to ATC for radar fixes.

⁶Respondent also argues that the tape recording should not be considered because parts of it are missing, noting that on a portion of an uncertified summary of his communications with ATC which was apparently provided to him by the FAA prior to the hearing, there is a notation that communications with the R12 sector are missing due to a mechanical malfunction. The certified copy of the transcript indicates that all of the relevant communications which establish the violations were between respondent and the R11 and R32 sector controllers, and not R12. Moreover, these communications appear to be unbroken in both the certified transcript and the tape, and both of these controllers also testified at the hearing. Thus the possible omission of any communications with the R12 sector are irrelevant to our findings here and do not, in any event, affect the reliability of the evidence in this record.

words (he consistently asserts that he does not have low altitude charts), even when he descended to a lower altitude and the effects of oxygen deprivation presumably would have abated. As the law judge aptly noted on the record, "[t]hat kind of blows a little bit of a hole in your hypoxic theory." (TR-115).

Respondent has shown no arbitrariness or capriciousness in the law judge's credibility determination, nor is this finding inconsistent with the evidence, since respondent failed to advance any supporting evidence, beyond his own opinion, as to why he believes he experienced hypoxia. Accordingly, we will not disturb the law judge's findings. Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

Finally, respondent argues that because the controllers were aware that he was flying the holding pattern in the wrong direction and because he was in controlled airspace, the finding of a violation of FAR section 91.75(b) should not stand since there was not even potential endangerment to others. We note that because of a similar argument put forth below, the law judge did not sustain the allegation of a violation of FAR section 91.9, and the Administrator has not appealed that finding. Thus, the issue as to whether respondent's failure to comply with ATC's instruction was also careless so as to endanger the life or property of another is no longer before the Board, and is irrelevant to our findings here.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the law judge's initial decision, and the initial decision are affirmed; and
3. The 30-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.⁷

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).